

The SBA has approved these definitions.¹⁷⁶ The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, seven bidders won 31 licenses that qualified as very small business entities, and one bidder won one license that qualified as a small business entity.

77. *Common Carrier Paging.* The SBA considers paging to be a wireless telecommunications service and classifies it under the industry classification Wireless Telecommunications Carriers (except satellite). Under that classification, the applicable size standard is that a business is small if it has 1,500 or fewer employees. For the general category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.¹⁷⁷ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.¹⁷⁸ The 2007 census also contains data for the specific category of "Paging" "that is classified under the seven-number NAICS code 5172101."¹⁷⁹ According to Commission data, 291 carriers have reported that they are engaged in Paging or Messaging Service. Of these, an estimated 289 have 1,500 or fewer employees, and 2 have more than 1,500 employees.¹⁸⁰ Consequently, the Commission estimates that the majority of paging providers are small entities that may be affected by our action.

78. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).¹⁸¹ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.¹⁸² Census data for 2007 shows that there were 1,383 firms that operated that year.¹⁸³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. According to Trends in Telephone Service data, 434

¹⁷⁶ See Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998) (*Alvarez Letter 1998*).

¹⁷⁷ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

¹⁷⁸ 13 C.F.R. § 121.201, NAICS code 517210.

¹⁷⁹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-skip=700&-ds_name=EC0751SSSZ5&-lang=en In this specific category, there were 248 firms that operated for the entire year in 2007. Of that number 247 operated with fewer than 100 employees and one (1) operated with more than 1000 employees. Based on this classification and the associated size standard, the majority of paging firms must be considered small.

¹⁸⁰ See *Trends in Telephone Service*, at tbl. 5.3.

¹⁸¹ 13 C.F.R. § 121.201, NAICS code 517210.

¹⁸² *Id.*

¹⁸³ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

carriers reported that they were engaged in wireless telephony.¹⁸⁴ Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.¹⁸⁵ Therefore, approximately half of these entities can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.¹⁸⁶ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.¹⁸⁷ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

79. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a “small business” for C- and F-Block licenses as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.¹⁸⁸ For F-Block licenses, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁸⁹ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.¹⁹⁰ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks.¹⁹¹ On April 15, 1999, the Commission completed the re-auction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.¹⁹² Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

80. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29

¹⁸⁴ *Trends in Telephone Service*, at tbl. 5.3.

¹⁸⁵ *Id.*

¹⁸⁶ *See Trends in Telephone Service*, at tbl. 5.3.

¹⁸⁷ *See id.*

¹⁸⁸ *See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824, 7850–52 ¶¶ 57–60 (1996) (“*PCS Report and Order*”); *see also* 47 C.F.R. § 24.720(b).

¹⁸⁹ *See PCS Report and Order*, 11 FCC Rcd at 7852 ¶ 60.

¹⁹⁰ *See Alvarez Letter 1998*.

¹⁹¹ *See Broadband PCS, D, E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

¹⁹² *See C, D, E, and F Block Broadband PCS Auction Closes*, Public Notice, 14 FCC Rcd 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, Fourth Report and Order, 13 FCC Rcd 15743, 15768 ¶ 46 (1998).

claimed small business status.¹⁹³ Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.¹⁹⁴ On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.¹⁹⁵ Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses.¹⁹⁶ On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78.¹⁹⁷ Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.¹⁹⁸

81. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services ("PCS") licenses have been conducted. For purposes of the two auctions that have already been held, "small businesses" were entities with average gross revenues for the prior three calendar years of \$40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.¹⁹⁹ A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these small business size standards.²⁰⁰ A third auction of Narrowband PCS licenses was conducted in 2001. In that auction, five bidders won 317 Metropolitan Trading Areas and nationwide licenses.²⁰¹ Three of the winning bidders claimed status as a small or very small entity and won 311 licenses.

82. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both

¹⁹³ See *C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 2339 (2001).

¹⁹⁴ See *Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58*, Public Notice, 20 FCC Rcd 3703 (2005).

¹⁹⁵ See *Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71*, Public Notice, 22 FCC Rcd 9247 (2007).

¹⁹⁶ *Id.*

¹⁹⁷ See *Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

¹⁹⁸ *Id.*

¹⁹⁹ *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 10456 (2000) ("*Narrowband PCS Second Report and Order*").

²⁰⁰ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

²⁰¹ See *Narrowband PCS Auction Closes*, Public Notice, 16 FCC Rcd 18663 (WTB 2001).

Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable. The SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.²⁰² For this service, the SBA uses the category of Wireless Telecommunications Carriers (except Satellite). Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.²⁰³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

83. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, the Commission adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²⁰⁴ This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.²⁰⁵ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.²⁰⁶ The SBA has approved these small size standards.²⁰⁷ Auctions of Phase II licenses commenced on and closed in 1998.²⁰⁸ In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.²⁰⁹ Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses

²⁰² 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

²⁰³ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²⁰⁴ *Amendment of Part 90 of the Commission’s Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, Third Report and Order, 12 FCC Rcd 10943, 11068-70 ¶¶ 291-295 (1997).

²⁰⁵ *Id.* at 11068 ¶ 291.

²⁰⁶ *Id.*

²⁰⁷ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998 (*Alvarez to Phythyon Letter 1998*).

²⁰⁸ See generally *220 MHz Service Auction Closes*, Public Notice, 14 FCC Rcd 605 (WTB 1998).

²⁰⁹ See *FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made*, Public Notice, 14 FCC Rcd 1085 (WTB 1999).

and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.²¹⁰ A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.²¹¹ In 2007, the Commission conducted a fourth auction of the 220 MHz licenses.²¹² Bidding credits were offered to small businesses. A bidder with attributed average annual gross revenues that exceeded \$3 million and did not exceed \$15 million for the preceding three years ("small business") received a 25 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$3 million for the preceding three years received a 35 percent discount on its winning bid ("very small business"). Auction 72, which offered 94 Phase II 220 MHz Service licenses, concluded in 2007.²¹³ In this auction, five winning bidders won a total of 76 licenses. Two winning bidders identified themselves as very small businesses won 56 of the 76 licenses. One of the winning bidders that identified themselves as a small business won 5 of the 76 licenses won.

84. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards small business bidding credits in auctions for Specialized Mobile Radio ("SMR") geographic area licenses in the 800 MHz and 900 MHz bands to entities that had revenues of no more than \$15 million in each of the three previous calendar years.²¹⁴ The Commission awards very small business bidding credits to entities that had revenues of no more than \$3 million in each of the three previous calendar years.²¹⁵ The SBA has approved these small business size standards for the 800 MHz and 900 MHz SMR Services.²¹⁶ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction was completed in 1996.²¹⁷ Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band.²¹⁸ The 800 MHz SMR auction for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.²¹⁹ A second

²¹⁰ See *Phase II 220 MHz Service Spectrum Auction Closes*, Public Notice, 14 FCC Rcd 11218 (WTB 1999).

²¹¹ See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

²¹² See *Auction of Phase II 220 MHz Service Spectrum Scheduled for June 20, 2007, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 72*, Public Notice, 22 FCC Rcd 3404 (2007).

²¹³ See *Auction of Phase II 220 MHz Service Spectrum Licenses Closes, Winning Bidders Announced for Auction 72, Down Payments due July 18, 2007, FCC Forms 601 and 602 due July 18, 2007, Final Payments due August 1, 2007, Ten-Day Petition to Deny Period*, Public Notice, 22 FCC Rcd 11573 (2007).

²¹⁴ 47 C.F.R. §§ 90.810, 90.814(b), 90.912.

²¹⁵ *Id.*

²¹⁶ See *Alvarez Letter 1999*.

²¹⁷ *FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas: Down Payments due April 22, 1996, FCC Form 600s due April 29, 1996*, Public Notice, 11 FCC Rcd 18599 (WTB 1996).

²¹⁸ *Id.*

²¹⁹ See *Correction to Public Notice DA 96-586, FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas*, Public Notice, 11 FCC Rcd 18637 (WTB 1996).

auction for the 800 MHz band was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.²²⁰

85. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.²²¹ In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.²²² Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

86. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees.²²³ We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

87. *Air-Ground Radiotelephone Service.* The Commission has previously used the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.²²⁴ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, the Commission estimates that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$40 million.²²⁵ A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.²²⁶ These definitions were approved by the SBA.²²⁷ In May 2006, the Commission

²²⁰ See *Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

²²¹ See *800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes; Winning Bidders Announced*, Public Notice, 15 FCC Rcd 17162 (WTB 2000).

²²² See *800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 1736 (WTB 2000).

²²³ See generally 13 C.F.R. § 121.201, NAICS code 517210.

²²⁴ 13 C.F.R. § 121.201, NAICS codes 517210.

²²⁵ *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules, Amendment of Parts 1 and 22 of the Commission's Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service*, WT Docket Nos. 03-103, 05-42, Order on Reconsideration and Report and Order, 20 FCC Rcd 19663 ¶¶ 28-42 (2005).

²²⁶ *Id.*

²²⁷ See Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, FCC (filed Sept. 19, 2005).

completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

88. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.²²⁸ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (“BETRS”).²²⁹ For purposes of its analysis of the Rural Radiotelephone Service, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.²³⁰ Census data for 2007 shows that there were 1,383 firms that operated that year.²³¹ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms in the Rural Radiotelephone Service can be considered small.

89. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (“VHF”) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.²³² Census data for 2007 shows that there were 1,383 firms that operated that year.²³³ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

90. *Fixed Microwave Services.* Microwave services include common carrier,²³⁴ private-operational fixed,²³⁵ and broadcast auxiliary radio services.²³⁶ They also include the Local

²²⁸ The service is defined in section 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

²²⁹ BETRS is defined in sections 22.757 and 22.759 of the Commission’s Rules, 47 C.F.R. §§ 22.757 and 22.759.

²³⁰ 13 C.F.R. § 121.201, NAICS code 517210.

²³¹ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

²³² 13 C.F.R. § 121.201, NAICS code 517210.

²³³ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

²³⁴ See 47 C.F.R. Part 101, Subparts C and I.

²³⁵ See *id.* Subparts C and H.

²³⁶ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission’s Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to (continued....)

Multipoint Distribution Service (“LMDS”),²³⁷ the Digital Electronic Message Service (“DEMS”),²³⁸ and the 24 GHz Service,²³⁹ where licensees can choose between common carrier and non-common carrier status.²⁴⁰ The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, the Commission will use the SBA’s definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons is considered small.²⁴¹ For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.²⁴² Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

91. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.²⁴³ There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA’s small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under that standard,²⁴⁴ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.²⁴⁵ Census data for 2007 shows that there were 1,383 firms that operated that year.²⁴⁶ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

92. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three (Continued from previous page) _____

the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

²³⁷ See 47 C.F.R. Part 101, Subpart L.

²³⁸ See *id.* Subpart G.

²³⁹ See *id.*

²⁴⁰ See 47 C.F.R. §§ 101.533, 101.1017.

²⁴¹ 13 C.F.R. § 121.201, NAICS code 517210.

²⁴² U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

²⁴³ This service is governed by Subpart I of Part 22 of the Commission’s Rules. See 47 C.F.R. §§ 22.1001-22.1037.

²⁴⁴ 13 C.F.R. § 121.201, NAICS code 517210.

²⁴⁵ *Id.*

²⁴⁶ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

previous calendar years.²⁴⁷ An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²⁴⁸ The SBA has approved these small business size standards.²⁴⁹ The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by our action.

93. *Wireless Cable Systems. Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (“MDS”) and Multichannel Multipoint Distribution Service (“MMDS”) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) (previously referred to as the Instructional Television Fixed Service (“ITFS”).²⁵⁰ In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.²⁵¹ The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (“BTAs”). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.²⁵² After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.²⁵³ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not

²⁴⁷ See Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, PP Docket No. 93-253, *Report and Order*, 12 FCC Rcd 18600 (1998).

²⁴⁸ *Id.*

²⁴⁹ See Letter to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

²⁵⁰ *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995).

²⁵¹ 47 C.F.R. § 21.961(b)(1).

²⁵² 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard of 1500 or fewer employees.

²⁵³ *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

exceed \$15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.²⁵⁴ Auction 86 concluded in 2009 with the sale of 61 licenses.²⁵⁵ Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

94. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.²⁵⁶ Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."²⁵⁷ For these services, the Commission uses the SBA small business size standard for the category "Wireless Telecommunications Carriers (except satellite)," which is 1,500 or fewer employees.²⁵⁸ To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007 shows that there were 1,383 firms that operated that year.²⁵⁹ Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use the classifications "firms" does not track the number of "licenses".

95. In the 1998 and 1999 LMDS auctions,²⁶⁰ the Commission defined a small business as an entity that has annual average gross revenues of less than \$40 million in the

²⁵⁴ *Id.* at 8296.

²⁵⁵ *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

²⁵⁶ The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

²⁵⁷ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

²⁵⁸ 13 C.F.R. § 121.201, NAICS code 517210.

²⁵⁹ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ5&-lang=en.

²⁶⁰ The Commission has held two LMDS auctions: Auction 17 and Auction 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998. (104 bidders won 864 licenses.) Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

previous three calendar years.²⁶¹ Moreover, the Commission added an additional classification for a “very small business,” which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.²⁶² These definitions of “small business” and “very small business” in the context of the LMDS auctions have been approved by the SBA.²⁶³ In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, the Commission believes that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission’s auction rules.

96. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 174 entities winning licenses for 594 Metropolitan Statistical Area (“MSA”) licenses. Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.²⁶⁴ In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, the Commission established a small business size standard for a “small business” as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.²⁶⁵ A “very small business” is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.²⁶⁶ These size standards will be used in future auctions of 218-219 MHz spectrum.

97. *24 GHz – Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category “Wireless Telecommunications Carriers (except satellite),” which is 1,500 or fewer employees.²⁶⁷ To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007 shows that there were 1,383 firms that operated that year.²⁶⁸ Of those 1,383, 1,368 had fewer than 100

²⁶¹ See *LMDS Order*, 12 FCC Rcd at 12545.

²⁶² *Id.*

²⁶³ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

²⁶⁴ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

²⁶⁵ *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999) (“*218-219 MHz Report and Order and Memorandum Opinion and Order*”).

²⁶⁶ *Id.*

²⁶⁷ 13 C.F.R. § 121.201, NAICS code 517210.

²⁶⁸ U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&- (continued....)

employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use of the classifications "firms" does not track the number of "licenses". The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent²⁶⁹ and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

98. *24 GHz – Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.²⁷⁰ "Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.²⁷¹ The SBA has approved these small business size standards.²⁷² These size standards will apply to the future auction, if held.

99. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.²⁷³ The second has a size standard of \$25 million or less in annual receipts.²⁷⁴

100. The category of Satellite Telecommunications "comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."²⁷⁵ Census Bureau data for 2007 show that 512 Satellite Telecommunications firms that operated for that entire year.²⁷⁶ Of this total, 464 firms had annual receipts of under \$10 million, and 18 firms had receipts of \$10

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ds_name=EC0751SSSZ5&-_lang=en.

²⁶⁹ Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

²⁷⁰ *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 ¶ 77 (2000); see also 47 C.F.R. § 101.538(a)(2).

²⁷¹ *Id.*; see also 47 C.F.R. § 101.538(a)(1).

²⁷² See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

²⁷³ 13 C.F.R. § 121.201, NAICS code 517410.

²⁷⁴ 13 C.F.R. § 121.201, NAICS code 517919.

²⁷⁵ U.S. Census Bureau, 2007 NAICS Definitions, 517410 Satellite Telecommunications.

²⁷⁶ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

million to \$24,999,999.²⁷⁷ Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

101. The second category, i.e. “All Other Telecommunications” comprises “establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”²⁷⁸ For this category, Census Bureau data for 2007 shows that there were a total of 2,383 firms that operated for the entire year.²⁷⁹ Of this total, 2,347 firms had annual receipts of under \$25 million and 12 firms had annual receipts of \$25 million to \$49,999,999.²⁸⁰ Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

e. Cable and OVS Operators

102. Because Section 706 requires us to monitor the deployment of broadband regardless of technology or transmission media employed, the Commission anticipates that some broadband service providers may not provide telephone service. Accordingly, the Commission describes below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

103. *Cable and Other Program Distributors.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”²⁸¹ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 1,383 firms that operated that year.²⁸² Of those 1,383, 1,368 had fewer than 100

²⁷⁷ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁷⁸ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search>.

²⁷⁹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁸⁰ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.

²⁸¹ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110> (last visited Oct. 21, 2009).

²⁸² U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-ds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of such firms can be considered small.

104. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.²⁸³ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²⁸⁴ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²⁸⁵ Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.²⁸⁶ Thus, under this second size standard, most cable systems are small.

105. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²⁸⁷ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²⁸⁸ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²⁸⁹ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,²⁹⁰ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

²⁸³ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

²⁸⁴ These data are derived from: R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006, TOP 25 CABLE/SATELLITE OPERATORS, pages A-8 & C-2 (data current as of June 30, 2005); WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2006, OWNERSHIP OF CABLE SYSTEMS IN THE UNITED STATES, pages D-1805 to D-1857.

²⁸⁵ 47 C.F.R. § 76.901(c).

²⁸⁶ WARREN COMMUNICATIONS NEWS, TELEVISION & CABLE FACTBOOK 2008, U.S. CABLE SYSTEMS BY SUBSCRIBER SIZE, page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

²⁸⁷ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

²⁸⁸ 47 C.F.R. § 76.901(f); see, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

²⁸⁹ See BROADCASTING & CABLE YEARBOOK 2006, at A-8, C-2 (Harry A. Jessell ed., 2005) (data current as of June 30, 2005); TELEVISION & CABLE FACTBOOK 2006, at D-805 to D-1857 (Albert Warren ed., 2005).

²⁹⁰ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

106. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.²⁹¹ The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.²⁹² The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,²⁹³ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”²⁹⁴ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.²⁹⁵ In addition, we note that the Commission has certified some OVS operators, with some now providing service.²⁹⁶ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.²⁹⁷ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 75 areas, and some of these are currently providing service.²⁹⁸ Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

f. Internet Service Providers, Web Portals and Other Information Services

107. *Internet Service Providers, Web Portals and Other Information Services.* In 2007, the SBA recognized two new small business economic census categories. They are (1)

²⁹¹ See 47 U.S.C. § 573.

²⁹² 47 U.S.C. § 571(a)(3)-(4). See *13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

²⁹³ See 47 U.S.C. § 573.

²⁹⁴ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²⁹⁵ See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

²⁹⁶ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

²⁹⁷ See *13th Annual Report*, 24 FCC Rcd at 606-07 ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

²⁹⁸ See <http://www.fcc.gov/mb/ovs/csovsr.html> (current as of February 2007).

Internet Publishing and Broadcasting and Web Search Portals,²⁹⁹ and (2) All Other Information Services.³⁰⁰

108. *Internet Service Providers.* The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (e.g., cable and DSL ISPs), or over client-supplied telecommunications connections (e.g., dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,³⁰¹ which has an SBA small business size standard of 1,500 or fewer employees.³⁰² These are also labeled "broadband." The latter are within the category of All Other Telecommunications,³⁰³ which has a size standard of annual receipts of \$25 million or less.³⁰⁴ These are labeled non-broadband.

109. The most current Economic Census data for all such firms are 2007 data, which are detailed specifically for ISPs within the categories above. For the first category, the data show that 396 firms operated for the entire year, of which 159 had nine or fewer employees.³⁰⁵ For the second category, the data show that 1,682 firms operated for the entire year.³⁰⁶ Of those, 1,675 had annual receipts below \$25 million per year, and an additional two had receipts of between \$25 million and \$ 49,999,999. Consequently, we estimate that the majority of ISP firms are small entities.

110. *Internet Publishing and Broadcasting and Web Search Portals.* This industry comprises establishments primarily engaged in 1) publishing and/or broadcasting content on the Internet exclusively or 2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.³⁰⁷ The SBA deems businesses in this industry with

²⁹⁹ 13 C.F.R. § 121.201, NAICS code 519130 (establishing a \$500,000 revenue ceiling).

³⁰⁰ 13 C.F.R. § 121.201, NAICS code 519190 (establishing a \$6.5 million revenue ceiling).

³⁰¹ U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

³⁰² 13 C.F.R. § 121.201, NAICS code 517110.

³⁰³ U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications," <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

³⁰⁴ 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

³⁰⁵ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 5171103 (rel. Nov. 19, 2010) (employment size). The data show only two categories within the whole: the categories for 1-4 employees and for 5-9 employees.

³⁰⁶ U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 5179191 (rel. Nov. 19, 2010) (receipts size).

³⁰⁷ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=519130&search=2007%20NAICS%20Search>

500 or fewer employees small.³⁰⁸ According to Census Bureau data for 2007, there were 2,705 firms that provided one or more of these services for that entire year. Of these, 2,682 operated with less than 500 employees and 13 operated with to 999 employees.³⁰⁹ Consequently, we estimate the majority of these firms are small entities that may be affected by our proposed actions.

111. *Data Processing, Hosting, and Related Services.* This industry comprises establishments primarily engaged in providing infrastructure for hosting or data processing services. These establishments may provide specialized hosting activities, such as web hosting, streaming services or application hosting; provide application service provisioning; or may provide general time-share mainframe facilities to clients. Data processing establishments provide complete processing and specialized reports from data supplied by clients or provide automated data processing and data entry services.³¹⁰ The SBA has developed a small business size standard for this category; that size standard is \$25 million or less in average annual receipts.³¹¹ According to Census Bureau data for 2007, there were 8,060 firms in this category that operated for the entire year.³¹² Of these, 6,726 had annual receipts of under \$25 million, and 155 had receipts between \$25 million and \$49,999,999 million.³¹³ Consequently, we estimate that the majority of these firms are small entities that may be affected by our proposed actions.

112. *All Other Information Services.* “This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives).”³¹⁴ Our action pertains to interconnected VoIP services, which could be provided by entities that provide other services such as e-mail, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is \$7.0 million or less in average annual receipts.³¹⁵ According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year.³¹⁶ Of these, 334 had annual receipts of under \$5

³⁰⁸ http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.

³⁰⁹ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ5&-_lang=en.

³¹⁰ U.S. Census Bureau, 2007 NAICS Definitions, “518210 Data Processing, Hosting, and Related Services”; <http://www.census.gov/naics/2007/def/ND518210.HTM#N518210>.

³¹¹ 13 C.F.R. § 121.201, NAICS code 518210.

³¹² http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ4&-_lang=en.

³¹³ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1000&-ds_name=EC0751SSSZ4&-_lang=en.

³¹⁴ U.S. Census Bureau, “2002 NAICS Definitions: 519190 All Other Information Services”; <http://www.census.gov/epcd/naics02/def/NDEF519.HTM>.

³¹⁵ 13 C.F.R. § 121.201, NAICS code 519190. *See also* http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

³¹⁶ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1200&-ds_name=EC0751SSSZ4&-_lang=en.

million, and an additional 11 firms had receipts of between \$5 million and \$9,999,999.³¹⁷ Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

113. We summarize below the recordkeeping and certification obligations of the accompanying *Report and Order*. Additional information on each of these requirements can be found in the *Report and Order*. These requirements will apply to all entities that must comply with Section 716 and Section 718.

114. *Recordkeeping*. The *Report and Order* requires, beginning one year after the effective date of the *Report and Order*, that each manufacturer of equipment used to provide ACS and each provider of such services subject to Sections 255, 716, and 718 not otherwise exempt under the *Report and Order*, maintain certain records. These records document the efforts taken by a manufacturer or service provider to implement Sections 255, 716, and 718. The *Report and Order* adopts the recordkeeping requirements of the CVAA, which specifically include: (1) information about the manufacturer's or provider's efforts to consult with individuals with disabilities; (2) descriptions of the accessibility features of its products and services; and (3) information about the compatibility of such products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access. Additionally, while manufacturers and providers are not required to keep records of their consideration of the four achievability factors, they must be prepared to carry their burden of proof, which requires greater than conclusory or unsupported claims. Similarly, entities that rely on third party solutions to achieve accessibility must be prepared to produce relevant documentation.

115. These recordkeeping requirements are necessary to facilitate enforcement of the rules adopted in the *Report and Order* and proposed in the *Further Notice*. The *Report and Order* builds flexibility into the recordkeeping obligations by allowing covered entities to keep records in any format, recognizing the unique recordkeeping methods of individual entities. Because complaints regarding accessibility of a product or service may not occur for years after the release of the product or service, the *Report and Order* requires covered entities to keep records for two years from the date the product ceases to be manufactured or a service is offered to the public. The *Further Notice* seeks comment on whether any of the recordkeeping and certification requirements should be modified for entities covered under Section 718.

116. *Annual Certification Obligations*. The CVAA and the *Report and Order* require an officer of providers of ACS and ACS equipment submit to the Commission an annual certificate that records are kept in accordance with the above recordkeeping requirements, unless such manufacturer or provider is exempt from compliance with Section 716 under applicable rules.³¹⁸ The certification must be supported with an affidavit or declaration under penalty of perjury, signed and dated by an authorized officer of the entity with personal knowledge of the representations provided in the company's certification, verifying the truth and accuracy of the information. The certification must be filed with the Consumer and Governmental Affairs Bureau on or before April 1 each year for records pertaining to the previous calendar year. The

³¹⁷ http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1100&-ds_name=EC0751SSSZ4&-_lang=en.

³¹⁸ 47 U.S.C. 618(a)(5)(B).

Further Notice seeks comment on whether any of the recordkeeping and certification requirements should be modified for entities covered under Section 718.

117. *Costs of Compliance.* There is an upward limit on the cost of compliance. Under the CVAA and *Report and Order* accessibility is required for entities under Section 716 and Section 718 unless it is not achievable. Under two of the four achievability factors from the Act and adopted in the *Report and Order*, which also apply to any rules adopted pursuant to this *Further Notice* implementing Section 718, covered entities may demonstrate that accessibility is not achievable based on the nature and cost of steps needed or the technical and economic impact on the entity's operation.³¹⁹ Entities that are not otherwise exempt or excluded under the *Report and Order*, or subsequent to this *Further Notice*, must nonetheless be able to demonstrate that they conducted an achievability analysis, which necessarily requires the retention of some records.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

118. The RFA requires an agency to describe any significant alternatives it considered in developing its approach, which may include the following four alternatives, among others: "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."³²⁰

119. We note that the *Further Notice* continues and preserves the steps taken in the *Report and Order* to minimize adverse economic impact on small entities. The *Further Notice* will continue to promote flexibility for all entities in several ways. The *Further Notice* does not alter the ability of an entity with obligations under Section 716 to seek a waiver for products or services that are not designed primarily for ACS, and does not impact the conclusion in the *Report and Order* that customized equipment is excluded. Further, small entities may continue to comply with both Section 716 and Section 718 by demonstrating that accessibility is not achievable, or may rely on third party software, applications, equipment, hardware, or customer premises equipment to meet their obligations under Section 716 and Section 718, if achievable. As stated below, the *Further Notice* also leaves unchanged the requirements adopted in the *Report and Order* that allow covered entities to keep records in any format they wish as this flexibility affords small entities the greatest flexibility to choose and maintain the recordkeeping system that best suits their resources and their needs.

120. The *Further Notice* also seeks comment on making permanent the temporary exemption from the Section 716 and Section 717 obligations for all small entities that was adopted in the accompanying *Report and Order*. Specifically, the *Report and Order* minimized the economic impact on small entities by temporarily exempting entities that manufacture ACS equipment or provide ACS that, along with any affiliates, meet the criteria for a small business concern for their primary industry under SBA's rules and size standards.³²¹ Correspondingly, the *Further Notice* now seeks to develop a record that would allow the Commission to determine whether to permanently minimize the impact on small entities that are subject to the requirements

³¹⁹ See 47 U.S.C. § 617(g).

³²⁰ 5 U.S.C. § 603(c)(1)-(c)(4).

³²¹ 13 C.F.R. §§ 121.101 – 121.201.

of Sections 716.

121. The *Further Notice* also seeks comment on alternative approaches to the standards used to provide the temporary small business exemption even as it seeks to develop a record on whether to make the existing exemption a permanent one. In essence, the *Further Notice* looks to the temporary exemption as a proposal for a permanent exemption and seeks to develop record support for continuing to minimize the economic and regulatory impact on small entities. In considering alternatives to the approach proposed for a permanent exemption, the *Further Notice* seeks comment on how it can refine the proposed approach.

122. With respect to recordkeeping and certification requirements, and as described above, the *Further Notice* leaves unchanged the requirements adopted in the *Report and Order* that allow covered entities to keep records in any format they wish. In the *Report and Order*, we found that this approach took into account the variances in covered entities (e.g., size, experience with the Commission), recordkeeping methods, and products and services covered by the CVAA. Moreover, we found that it also provided the greatest flexibility to small businesses and minimized the economic impact that the statutorily mandated requirements impose on small businesses. Correspondingly, we considered and rejected the alternative of imposing a specific format or one-size-fits-all system for recordkeeping that could potentially impose greater burdens on small businesses. Furthermore, the certification requirement is possibly less burdensome on small businesses than large, as it merely requires certification from an officer that the necessary records were kept over the previous year; this is presumably a less resource intensive certification for smaller entities. The *Further Notice* seeks comment on whether any of the recordkeeping requirements should be modified for entities covered by Section 718.

F. Federal Rules that May Duplicate, Overlap, or Conflict with Proposed Rules

123. Section 255(e) of the Act, as amended, directs the United States Access Board (“Access Board”) to develop equipment accessibility guidelines “in conjunction with” the Commission, and periodically to review and update those guidelines.³²² We view the Access Board’s current guidelines as well as its draft guidelines³²³ as starting points for our interpretation and implementation of Sections 716 and 717 of the Act, as well as Section 255, but because they do not currently cover ACS or equipment used to provide or access ACS, we must necessarily adapt these guidelines in our comprehensive implementation scheme. As such, our rules do not overlap, duplicate, or conflict with either Access Board Final Rules,³²⁴ or (if later adopted) the Access Board Draft Guidelines. Where obligations under Section 255 and Section 716 overlap, for instance for accessibility requirements for interconnected VoIP, we clarify in the *Report and Order* which rules govern the entities’ obligations.

³²² 47 U.S.C. § 255(e).

³²³ United States Access Board, *Draft Information and Communication Technology (ICT) Standards and Guidelines*, (March 2010), (“Access Board Draft Guidelines”), <http://www.access-board.gov/sec508/refresh/draft-rule.pdf>.

³²⁴ See Part 1193 of the Access Board Rules, 36 C.F.R. Part 1193.